NO. 3723

United States

Circuit Court of Appeals

For the Ninth Circuit

G. H. BACHENBERG,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Defendant in Error

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Filed this.....day of February, A. D. 1922

FRANK D. MONCKTON, Clerk.

By.....

Deputy Clerk.

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A statement of the facts in this case, essential for consideration in connection with the contention of Plaintiff in Error, will be deferred, until, by reason of points presented it will be advantageous to present the facts with the law.

The points urged by Plaintiff in Error, in this case, are almost identical with the contentions made before this Court in case No. 3722, U. S. v. E. Vachina and the answering Brief, of necessity, therefore, will be to some extent, a reiteration of the arguments

made by the Government in the Vachina case.

PLAINTIFF IN ERROR'S CONTENTION.

It is earnestly insisted as grounds for a reversal of the judgment that,

(a) **The affidavit for the issuance of a search warrant is insufficient because of the failure to state therein facts sufficient to establish probable cause and that by reason thereof the search warrant was void.**

In presenting this contention to the lower Court, there was filed a motion to quash the search warrant before the U. S. Commissioner who issued the same, which motion was denied by the Commissioner.

(b) **The action of the United States Commissioner in denying the motion to quash the search warrant was attempted to be reviewed in the District Court and the refusal of the District Court to entertain the motion is alleged as error.**

(c) **Thereafter a motion to quash the search warrant issued by the U. S. Commissioner was filed in the District Court after the indictment was returned and it is alleged that the Court erred in denying said motion.**

(d) **The insufficiency of the affidavit for the issuance of a search warrant was again attacked by objections interposed to the testimony of witnesses Nash and Brown upon the trial of the case.**

(e) **The search warrant was illegal.**

While Plaintiff in Error enumerates a ground of error predicated upon Assignment of Error No. 5, from the absence of any lengthy discussion in his Brief under this heading, it is to be presumed that

the same is not urged with much seriousness.

It is contended under this assigmment that:

(f) **The Court erred in its refusal to permit counsel for defendant to inquire of Nash, a witness for the Government, during the trial of the case, upon cross-examination, as to his actual knowledge of the alleged facts and statements made in the affidavit for search warrant.**

(g) **Assuming a valid affidavit was filed and a legal search warrant issued, that the search and seizure was unlawful for the reason, that, prior to the search and seizure, the officers did not present to Plaintiff in Error the search warrant issued in the case and did not advise him that they were officers and had in their possession a valid search warrant.**

GOVERNMENT'S CONTENTION

In opposition to Plaintiff in Error's theories, we submit:

(1) **That the affidavit was sufficient upon which the search warrant issued.**

(2) **That under the facts as shown by the testimony no search warrant was required.**

Plaintiff in Error assumes the burden of establishing, not only that the affidavit for search warrant was insufficient, but also, that he does not come within the exception which permits the seizure of property without a search warrant; the latter excluding the necessity for a search warrant and predicating the officer's right to seizure upon the theory of a crime being committed in his presence.

If the contentions of the Government as enumer-

ated above are correct, it will obviate a determination by this Court of the other alleged errors with the possible exception of the one stated under assignment No. 5, for the reason that the other assignments are based upon the theory that neither of the Government's two contentions are supported in law or in fact.

The material part of the affidavit for search warrant in this case which is attacked reads thusly:

> "That the facts, circumstances and conditions of which affiant has knowledge and as ascertained by affiant are as follows, to-wit: Direct information to affiant by a citizen of Reno whom affiant has known for a long time and whom affiant believes to be absolutely truthful and reliable, that liquor is being sold over the bar at said premises, and that said informant purchased a drink there on this date. That affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor."

It is respectfully urged that this recital in the affidavit was sufficient to warrant a finding of probable cause by the commissioner.

The essential elements in the finding of probable cause are:

(a) Credibility of the party making the charge.

(b) Sufficient facts stated from which probable cause can be determined.

Plaintiff in Error has cited a number of authorities wherein the Courts were called upon to determine the sufficiency of statements contained in affidavits for the issuance of a search warrant. A reading of these cases reveals that the party mak-

ing the affidavit gave to the commissioner his conclusions instead of the facts upon which he arrived at conclusions.

In determining the sufficiency of the statements, contained in these affidavits, the Courts have observed that probable cause could not be established by the statements of conclusions purely, of the party making the affidavit. That, therefore, the facts which force the affiant to the conclusion must be stated to the magistrate.

It will be noted from the affidavit in the instant case, that the facts were stated to the commissioner, to-wit: That on the day upon which the information was given to affiant, the party giving the information "Had purchased intoxicating liquors on the premises of the defendant." This is not a conclusion, but a statement of a positive fact from which the commissioner could correctly decide that probable cause existed for the issuance of a search warrant.

It will be noted from the affidavit that the name of informant was not stated, but a statement of the facts were set forth which established the credibility of the informant to a greater degree than the giving of informant's name could possibly have done.

Suppose the informant in this case was a stranger to the officer and the commissioner. It would be difficult for the Commissioner to determine the truthfulness of the accusation. The recital by Nash, who made the affidavit, to the commissioner, that the party who gave him the information was a citizen of Reno and known to him for a long time and for these reasons affiant could vouch for his veracity, must be considered of greater weight in establishing

credibility, than advising the commissioner of the name of the informant.

In addition to the facts recited by informant the affidavit recited that an independent investigation was made by the Prohibition Officers and that two persons were seen coming away from said premises under the influence of liquor. This statement by itself, may, or may not, be sufficient to establish probable cause, but taken into consideration with the statement made by informant, it tends to corroborate the same and is entitled to be given some weight by the magistrate in arriving at his conclusion as to whether or not probable cause was established.

What deduction would be drawn by the ordinary individual from the fact that he saw intoxicated men coming from the premises where soft drinks were kept for sale. Could he reason without fear of his logic being seriously questioned, that intoxicated men were frequenting these places to purchase soda-water and soft drinks? Certainly he would conclude as a reasonable man that the place from which these parties came was selling or givng away intoxicating liquor.

We respectfully submit that a Judge or Commissioner, is not required to warp his reasoning powers and close his eyes and ears to the consideration of facts which would lead reasonable and prudent men to a just conclusion.

The rule of law sought to be applied by Plaintiff in Error to test the sufficiency of facts in establishing probable cause for the issuance of a search warrant would compel the Government, in all cases, to set forth statements establishing the truth of the same beyond a reasonable doubt. This, we submit is

not the correct test. A test of this character would exclude the issuance of a search warrant where the evidence was entirely circumstantial. It cannot be said that the rule in reference to search warrants is more stringent than the rule which is applied by the Courts in issuing warrants for arrest.

The ordinary citizen is not prone to assist officers in the enforcement of the law and the citizen is an exception who will make and file an affidavit before a Commissioner for the issuance of a search warrant.

The individual feels no doubt, that his duty to society is discharged when he gives to the officer information respecting the law's violation. What can the officer do under these circumstances? Certainly no more than was done in this case where it is disclosed that the premises were watched by the Prohibition Officers and when corroborating facts were discovered, to-wit: witnessing intoxicated men coming from the premises that sufficient facts were then in their possession to establish probable cause for the issuance of a search warrant.

The language of the Supreme Court of Wisconsin upon the subject in the case of the State vs. Davie, 22 Northwestern, 411, appeals to us as containing good, sound logic. The Court stated:

> "In reference to the authorities that may hold that in all cases before an accused person can be arrested for crime a complaint must be made in positive terms and by a person who knows of all the facts constituting the offense, we are free to say that they are unreasonable, if nothing more. There would be, and could be, but very few arrests under such a rule. Crime frequently rests upon

circumstantial evidence, and very numerous facts in the knowledge of numerous persons, and all such witnesses could not be speedily and summarily brought before the magistrate to make complaint, and they could not be compelled to do so if they could be found... * * * The rule contended for would make the execution of the criminal laws impractical if not impossible, and many offenders would escape justice. It would be a very humane and safe rule for the criminal, but cruel and unsafe for society. The complainant may be in possession of such facts, by information or otherwise, as would give him good reason to believe that a certain person had committed an offense, and the persons who have knowledge of the facts of the crime may be either unable or unwilling to make complaint. What shall be done? Our statute sufficiently guards and protects the rights of accused persons, and, if strictly followed, there will be no danger of wanton or causeless arrests, and it is by our own statute that this complaint is to be tested." State v. Davie 62 Wis. 305, 309, 22 NW 411.

See also Beavers v. Henkel, 194 U. S., p. 73; 40 Law Addition 882.

Rice v. Ames, 180 U. S., P. 371; 45 Law Edition 577; Wiley v. State 170 Pac. 869;

Ocampo v. U. S., 58 Law Edition 1231;

Griswold v. Griswold, 77 Pac. 672; 32 Cyc. 402.

(2) **That under the facts as shown by the testimony, no search warrant was required.**

The issues in this case were submitted to a jury entirely upon the testimony of Government witnesses, and it is established thereby that on the 9th of April, 1921, Plaintiff in Error was operating what was designated as the Palace Bar. On the evening of the 9th of April, Prohibition Officers Nash and

Brown entered the premises. Five customers were lined up in front of the bar and twenty or thirty people were in the bar-room proper. When the Plaintiff in Error saw the prohibition agents in the saloon he made a run for the end of the bar facing the street. The prohibition officers then jumped over the bar and saw the Plaintiff in Error make a kick at a bottle which was in close proximity to a hole or trap in the floor. The agents and Plaintiff in Error had a tussle and all went to the floor. When Plaintiff in Error was permitted to get up he made another effort to destroy the evidence by kicking the bottle down the hole. He even called to parties on the other side of the bar to break the bottle. This bottle was taken by the officer and the testimony establishes that it contained 41.9 per cent. alcohol and was fit for beverage purposes.

It further appears that near the center of the bar and in close proximity to the drainboard there was a hole cut in the floor ten inches square. In the cellar directly under this hole there was a large pile of rocks. This portion of the cellar was enclosed by a locked compartment.

When the Plaintiff in Error saw the Prohibition Officers, he endeavored to reach the bottle that was on the floor containing the intoxicating liquor and kick it down the hole upon the rock pile in the cellar, thereby destroying the evidence.

We have here a state of facts which conclusively establishes that Plaintiff in Error designedly and with premeditation set about to engage in the unlawful business of possessing and disposing of intoxicating liquors. He had a contraption erected in his place of business viz: a hole in the floor and a pile of

rocks underneath in the cellar, for the purpose of destroying the evidence in the event of a raid by prohibition officers.

The testimony establishes a condition of facts, showing an utter disregard for the Prohibition Law and an intended design to openly flaunt its provisions. The Plaintiff in Error, however, with all the facts stated above admitted, now urges that his constitutional right has been invaded by an unlawful search and seizure.

We submit it is ludricrous for Plaintiff in Error under this state of facts to urge that by virtue of any provision of the constitution he is immune from search and seizure. The officers saw his customers at the bar. They saw Plaintiff in Error running to the other end of the bar to seize the liquor that was on the floor, which action plainly indicated a consciousness of guilt.

Under these circumstances, it is respectfully submitted that a crime was committed in the presence of the officers and they had a right, without a search warrant, to arrest the defendant and take into their possession the intoxicating liquor. Their entry upon the premises was not a trespass. This was a place of business where anyone could go without the owners consent. Having, therefore, the right to enter, they were authorized to seize the liquor used by Plaintiff in Error without having a search warrant.

(See Sections 25 and 33, Title II, N. P. A.; Sullivan v. United States No. 3637, Circuit Court of Appeals 9th Circuit, decided Dec. 5th, 1921.

U. S. v. Borkowski, 268 Federal, 408;

U. S. v. Murphy 264 Federal, 842;

U. S. v. Welch, 247 Federal, 239.)

(b) **The action of the United States Commissioner denying the motion to quash the search warrant was attempted to be reviewed in the District Court and the refusal of the District Court to entertain the motion is urged as error.**

Answering this contention we submit: That the United States Commissioner is an arm of the District Court and the District Court has no authority to review its own decisions.

(U. S. v. Moresca, 266 Federal 713.)

It is next urged by Plaintiff in Error:

(6) **That thereafter a motion to quash the search warrant issued by the United States Commissioner was filed in the District Court after the Indictment was returned and it is alleged that the Court erred in denying said motion.**

Replying to this statement, it is our position that the affidavit for search warrant was sufficient and, if it were not, the evidence discloses that a crime was committed in the presence of officers and they had a right to make the arrest and seize the liquor, and for these reasons no error was committed in denying the motion. If the lower Court was not authorized to review the action of the United States Commissioner in its refusal to quash the search warrant it must logically follow that an independent motion made in the lower Court for the purpose of quashing the search warrant was not proper. This action would require the Court indirectly to review the Commissioner's order.

Plaintiff in Error had a remedy in the lower Court which afforded him complete relief but he failed to pursue it. The doctrine is established be-

yond question that where a search is unlawful or where the affidavit for search warrant is insufficient, the proper remedy is by petition for return of property taken under unlawful seizure.

(Weeks v. U. S., 232 U. S. 383, 58 Law Edition 632; Boyd v. U. S., 116 U. S. 616, 29 Law Edition 746).

It is also insisted by Plaintiff in Error:

(d) **That the lower Court erred in not sustaining an objection to the testimony of Nash and Brown during the trial of the case.**

If we are right in our statement of the law that one must preserve his right where property is alleged to have been unlawfully taken, by petitioning the Court for its return before trial, it is respectfully submitted that the rule of law is well established that the Court will not stop during the trial to ascertain whether or not the testimony was lawfully or unlawfully obtained.

It is further contended:

(e) **That the search warrant was illegal.**

In the lower Court the only objection taken by Plaintiff in Error to the search warrant was that it was void for the reason that the affidavit upon which it issued was insufficient. Plaintiff in Error, at no stage of the proceeding, objected to the search warrant for any alleged insufficiencies in the search warrant itself and we therefore respectfully submit that Plaintiff in Error is not now in position to urge that the search warrant was or is insufficient by reason of any defect or recital, or lack of recital in the search warrant itself.

As we have heretofore noted, Plaintiff in Error has not urged with much seriousness the error enum-

erated under Assignment No. five. This assignment is set forth in subdivision (f) and states:

(f) **Refusal of the Court to permit counsel for defendant to inquire of Nash, a witness for the Government, during the trial, as to his actual knowledge of the facts and statements made by him in the affidavit upon which the search warrant issued**

No doctrine of law is better settled than the one which ennunciates the rule that the Court will not stop in the middle of a trial and go into a collateral issue made by reason of some objection interposed based upon testimony which may or may not have been unlawfully obtained.

(U. S. v. Weeks, 232, U. S. 383).

(Boyd v. U. S., 116 U. S. 616, 29 Law Edition, 632).

The last contention made by Plaintiff in Error is stated under subdivision (g) which recites:

(g) **Assuming a valid affidavit was filed and a legal search warrant issued, the search and seizure was unlawful for the reason that prior to the search and seizure the officer did not present to Plaintiff in Error the search warrant issued and did not advise him that they were officers and had in their possession a valid search warrant.**

It may be useful in discussing this point to refer to the testimony of Agent Nash, Transcript of Record, page 73, where the following matters were testified to by him:

Mr. DISKIN: Why didn't you present your search-warrant to Mr. Bachenberg prior to your going over the bar?

Mr. MOORE: If the Court please, I object to

the question as not proper cross-examination, and it is irrelevant at this time.

The COURT: The objection will be overruled.

Mr. MOORE: Give us the benefit of an exception.

WITNESS: I had no opportunity to do so. To present a search warrant it is necessary that the man will take it; I can't pass the search warrant through the air to him, when he is running.

Mr. DISKIN: When you first saw Mr. Bachenberg on this occasion what was he doing?

A. At the very instant that we entered the door, before he turned his back in our direction, he was standing at the upper end of the bar serving a drink but as soon as Mr. Brown and myself came inside, he left his position and started running down the length of the bar on the inside; and then the two struggles that were spoken of previously took place. As soon as the second struggle was over and Mr. Backenberg rose to his feet, I told him I had a warrant; he says, "I know that," he says, "I know you, and you would not be here without a warrant," or words to that effect. (71). I said, "All right then." Then he went right ahead. I told him I would give him a copy of it, and I also told him I would give him a receipt for the liquor that we seized; I did before we parted company, but I didn't give him a receipt behind the bar for the liquor, because of the fact that we were not through with our search; we went into the cellar and spent fifteen minutes down there. Before we parted company, though, I gave him a copy of the warrant, and also gave him a receipt for the liquor seized.

Q. In the conversation which you had with Mr. Bachenberg, did he state anything with reference to whether or not he knew you?

A. He said he knew me, yes, knew who I was. I judged from what he said he must have known me, because the first thing he said was, "I know who you are; that is all right"; that is the way I think he put the answer to my statement that I was an officer with a warrant; he said, "I know who you are, and that is all right."

(Transcript of Record pages 73, 74 and 75).

This testimony, which is not contradicted, reveals that Nash and Brown were known to Plaintiff in Error as Prohibition Officers and from his actions, when they entered the premises, it is disclosed that he knew the purpose of their visit.

The rule is well settled that where the party, to be arrested knows the officers, it is not necessary for them to exhibit to him the warrant. The leading case on this subject is that of U. S. v. Rice, 27 F Cas. No. 16, 153 where the Court stated:

"A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, if he resist; if no resistence is offered, the officer ought always, upon demand made, show his warrant to the party arrested or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of precaution. A defendant is bound to submit to a known officer; to yield himself immediately and peacably into the custody of an officer before the law gives him the right of having the warrant read and explained; when in resistance, the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the

wrong." U. S. v. Rice 27 F Cas. No. 16, 153, 1 Hughes 560, 564.

Another leading case which does not differentiate between the lack of knowledge or knowledge of the party to be arrested as to the identity of the officer is State v. Townsend, 5 Delaware, 488. This Court states the following doctrine:

> "It was not necessary for him either to produce his warrant or state his character and authority before making the arrest. The arrest itself is the laying hands on the defendant; and it might be defeated by the ceremony of production and explaining a paper before the arrest is made. It is quite time to produce the authority on the demand of the party arrested, and after the arrest. Every one is bound to know the character of an officer who is acting within his proper jurisdiction and every citizen is bound to submit peaceably to such officer, until he can demand and investigate the cause of his arrest. If the officer have no proper warrant for the arrest, he is liable to the defendant, who can suffer no wrong from submitting to the law; but if he resist before such investigation, and the officer have authority, he is indictable for obstructing such officer in the discharge of his duty."

In the case of O'Halloran v. McQuirk, 167 Federal, 493, it is stated:

> "An officer is not bound to exhibit his warrant to the person whom it authorizes him to arrest until asked for."

If it is the law that, under facts as shown to exist in the instant case, an officer before making a search must exhibit his warrant, then we submit that the violators of the Prohibition Law may continue in

their unlawful business without fear of prosecution.

Such a rule places a premium on the unlawful acts of a person in the destruction of evidence.

Such a rule sanctions and rewards the diligence of one who makes successful devices for the law's infractions.

Such a rule punishes a person not for violating the law, but for getting caught in its violation.

We urge in conclusion that it is established by record in this case that Plaintiff in Error, with predetermination, advisedly set about to violate the law, and, to prevent detection, constructed devices to foil the officers in the event of a raid.

Such conduct cannot meet with the approbation of the Court and certainly the constitutional provision in reference to search and seizure, does not afford protection to the tools of a burglar, or the corpus of a crime.

The search and seizure provision of the constitution, we respectfully submit, is not to be interpreted so as to absolve the guilty from just punishment or to furnish aid and assistance to the criminal by impeding the due and lawful enforcement of laws.

We respectfully urge that judgment of the lower Court should be affirmed.

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